

station (R. Ex. 4, pp. 2-3).

41. Their third conversation concerning Eldon took place on March 17, 1992, when they had dinner together at the Southside Pizza Hut in Ottumwa. According to Brown, McVey brought up the Eldon situation, and stated that he had been asked by "the Linders" to find a transmitter site for the Sample application which would enable city-grade coverage of Eldon without overlapping the city-grade contour of KKSI; that, if Sample is successful, they plan to simulcast KKSI-FM; and that, although he was not familiar with the details concerning the arrangement between Carmela Sample and Bruce Linder, he was certain that the Linders would not let her manage the Eldon station, because of her lack of management experience (Id., pp. 3-4).

42. McVey acknowledges that he had conversations with Brown concerning the Eldon matter in June 1991 and January and March 1992. He claims that he cannot "recall making all of the statements he [Brown] attributes to me, but am unable to provide evidence that I did not say them" (S. Ex. 5, pp. 4-5). In his written testimony, he states: "I had not spoken to anyone connected with KKSI about this subject prior to the time of my conversation with Brown in [June] 1991" (Id.); however, on cross-examination, he conceded that he had advised Bruce Linder of the proposed allotment to Eldon within several weeks of learning about it from Ben Evans, in the Spring of 1991 (Tr. 243-44).

43. William Collins, an employee of KKSI in the Spring of 1991, testified that in April 1991, in the KKSI studios in

Oskaloosa, McVey stated, in the presence of several KKSI employees, that an allocation had been proposed for Eldon, and remarked that "we ought to get Carmela to file on that frequency, and then what we ought to do is tie them together so you would have KKSI from here to the Mississippi River" -- a remark which Collins did not take as a serious proposal (R. Ex. 5, p. 1). McVey initially testified that he recalled talking about the Eldon proposal generally as described by Collins, but didn't recall mentioning Carmela Sample (Tr. 233). Later, he testified that he believed that Ms. Sample was present when he made those statements, and conceded that her presence might have prompted him to say that "we ought to get Carmela to file" for it (Tr. 250). He also recalled that later the same day, Collins informed him privately that David Brown was the proponent of the Eldon allocation (Tr. 231-32).

44. Mr. Collins also described a conversation with McVey in early April 1992, when McVey telephoned him at Station KKMI, Burlington, where Collins was then employed. According to Collins,

"The general tone of his call was to inquire whether I would consider coming back to work for KKSI; however, he brought up the subject of tying KKSI and the Eldon station together, and suggested that the Linders would 'have a place for David Brown.' These matters were rather loosely put by Mr. McVey, and seemed more in the nature of 'tossing ideas around' than any coherent plan of attack. My response was to express my gratitude for his consideration, but left the subject of possible employment by KKSI up in the air."

(R. Ex. 5, pp. 1-2).

45. Mr. McVey conceded that Collins' testimony concerning

the call of April 1, 1992 was a fair summary of that conversation (Tr. 235). Moreover McVey did not specifically deny any of the remarks attributed to him by David Brown, in their conversations of June 1991; January 18, 1992; and March 17, 1992, set forth above in ¶¶ 38-40. Rather, he sought to put distance between his statements and KKSI, by characterizing his conversations with Brown as "not in my official capacity," and (as to the June 1991 conversation) as "strictly my own brain-storming." (S. Ex. 5, p. 5). McVey's feelings about his relationship with the Linder family appear to be ambiguous: On the one hand, he states:

"I am very thankful to know the Linders. They were instrumental in saving my investment in station KKSI when my original financing source died and I was having difficulty locating a substitute source."²¹ (Id.)

On the other hand, McVey acknowledges:

"I admit to being frustrated and even angry from time-to-

²¹ McVey was the sole owner of O-Town when it applied for the Eddyville station in 1988. The dismissal of a competing applicant (enabling the grant of O-Town's application) was procured with funds advanced by the Linders. At the time that the Linders (John and Donald) agreed to advance those funds (and the funds necessary to construct the station) to O-Town, they entered into an oral agreement with McVey to acquire control of O-Town. The agreement was never reduced to writing, nor was the Commission informed thereof prior to the grant of O-Town's application on December 7, 1989. The first ownership report filed for the permittee (signed July 31, 1990, by John Linder) reported that McVey held 51 shares (51%); Donald Linder held 29 shares (29%); and John Linder held 20 shares (20%). That report did not inform the Commission of the existence of the agreement for the Linders to acquire control of O-Town. In December 1990, an application was filed to transfer control of O-Town to Donald Linder, through his acquisition of 31 shares (31%) from McVey, based upon a written agreement calling for the payment to McVey of \$1,240 -- the only payment which McVey has received from the Linders for 80% of the equity in O-Town. (Tr. 219-227). When Bruce Linder acquired John Linder's 20 shares, McVey was not offered an opportunity to purchase the shares (Tr. 229).

time that more of my suggestions are not implemented. These feelings have sometimes resulted in mean-spirited statements about my fellow principals which are not based on fact." (Id., pp. 5-6).

46. More specifically, in response to Brown's recital that McVey said that Sample would rebroadcast KKSI, McVey states that he believed that whoever operated the Eldon station "should seriously consider a joint programming arrangement," but that he was "not aware of Ms. Sample's plans for operating the station," and "had not spoken to Mr. Linder, Ms. Sample, or anyone else about plans for the Eldon station." (Id., p. 8). In the same vein, McVey states (referring to the January 18, 1992 conversation, wherein he expressed his opinion that Bruce Linder would control Ms. Sample): "if I said it, it was my feeling at the time due to my personal frustration."

47. Mr. McVey acknowledged that the Eldon station would compete with KKSI for audience and revenues (Tr. 267-68), and believes that the market in which it would operate is highly competitive, and suffering from hard economic times, making a stand-alone Eldon operation risky (Tr. 266-67). As a 20% stockholder in O-Town, he would expect to receive 20% of the net proceeds of any sale of Station KKSI (Tr. 230).

48. Mr. Linder stated his belief that KKSI and the Eldon station would compete "somewhat." (Tr. 337). He conceded that KKSI currently obtains 50% or more of its advertising revenues from Ottumwa (an increase from 25 - 30% at the time of the filing of the Sample application), and noted that KKSI is downsizing its Oskaloosa studios and moving more of its sales force to its

Ottumwa offices (Tr. 340). He claimed that he could not envision any manner in which the Eldon station would make KKSI more valuable (Tr. 337). He noted that KKSI is currently for sale (Tr. 340).

III. Proposed Conclusions

A. The Relationship Between Sample Broadcasting And O-Town Communications (KKSI) Requires Sample's Disqualification

49. Before turning to the standard comparative issue, it is appropriate to examine the basic qualifications of Sample Broadcasting under the enlarged issues (§1, supra) concerning the interrelationship of O-Town Communications, licensee of Station KKSI, Eddyville, and its principals, and Sample Broadcasting, and whether the Sample application was filed, in whole or in part, to delay a grant of the Rivertown application.

50. The issues were enlarged on the basis of various statements made by Mr. McVey, an officer, director and 20% stockholder of O-Town, to Rivertown's Mr. Brown and others, both prior and subsequent to the filing of the Sample application. In June 1991 (during the pendency of the rulemaking proceeding leading to the Eldon allocation), Mr. McVey had explored with Brown (the proponent of the Eldon allocation) his interest in rebroadcasting KKSI. During this conversation, McVey acknowledged that the Linders were aware of Brown's proposed Eldon allocation, but did not know whether they planned to apply for an Eldon station.

51. The Sample application was filed on October 10, 1991; three months later, on January 18, 1992, McVey (who had assisted Ms. Sample-Day in selecting her equipment, preparing her budget, and locating her transmitter site) advised Brown that the Sample application had been filed to delay the grant of Rivertown's application; that the Sample transmitter site had been selected to avoid city-grade contour overlap with KKSI so that Bruce Linder could have ownership interests in both stations; that Ms. Sample was being used because of her minority status; and that, in his opinion, Bruce Linder would be controlling her and the station. These points were made again by McVey to Brown in a conversation two months later, on March 17, 1992. At that time, McVey also stated that, if Sample received the grant, the station would simulcast KKSI.

52. Mr. McVey has not denied making the statements attributed to him: Rather, he testified that he cannot "recall all of the statements he attributes to me." (See ¶42; emphasis added). As detailed at ¶45, McVey sought to diminish the significance of his remarks to Brown with the assertion that they were made "not in my official capacity" or "strictly my own brain-storming;" and (as to his comments concerning the Linders), that his feelings of frustration and anger that his own recommendations to the Linders concerning KKSI matters have been ignored "have sometimes resulted in mean-spirited statements about my fellow principals which are not based on fact."

53. He explained his January 18, 1992 statement concerning

the likelihood that Bruce Linder would control Ms. Sample as follows: "If I said it, it was my feeling at the time due to my personal frustration." Moreover, the history of the migration of O-Town's stock and control from McVey to the Linders chronicled at footnote 21, supra, offers a sound basis for McVey's opinion as to the likelihood of Bruce Linder controlling Sample, even without regard to McVey's "personal frustration."

54. The totality of the circumstances surrounding the formation of Sample Broadcasting offers independent corroboration of McVey's expressed view that Ms. Sample (for all her good intentions) will be controlled by Mr. Linder. These circumstances include:

- o Ms. Sample-Day is employed by O-Town Communications.
- o Although Donald Linder is the controlling stockholder of O-Town, he seldom visits the station, and Bruce Linder is the principal family representative in overseeing the station, establishes the station's payroll and, with the station manager, participates in hiring decisions.
- o Ms. Sample-Day's broadcast experience has been limited, and does not include any management experience.
- o Ms. Sample-Day has had no business experience.
- o Ms. Sample-Day has made no investment in the applicant, and has no obligation (vis-a-vis the partnership) to do so.
- o Bruce Linder has loaned the partnership all funds required (beyond his initial capital contribution of \$6,000) to prosecute its application, and will loan it \$300,000 for the

construction and initial operation of the station, receiving a first lien on its assets.

- o Bruce Linder suggested the limited partnership structure for the applicant; Ms. Sample-Day acquiesced, although she had no understanding as to the difference between a corporation and a partnership. The partnership agreement was prepared by local counsel with input from communications counsel for Sample and O-Town.
- o Ms. Sample-Day relied upon Mark McVey to advise her in selecting equipment for the proposed station, and relied upon both McVey and FCC counsel (for O-Town as well as Sample) in preparing her budget estimates.
- o Ms. Sample-Day relied upon Mark McVey to assist her in selecting Sample's transmitter site. In selecting the area for that site, he was guided by the belief that overlap of the KKSI and Eldon 70 dBu contours was to be avoided because of Bruce Linder's involvement in the application, which he attributes to his uninformed assumption that Mr. Linder would be an active participant.²² Ms. Sample-Day was apparently uninformed as to McVey's belief and assumption,

²² That McVey was ultimately charged the \$200 cost of the 70 dBu overlap study performed by Owl Engineering in August 1991 -- after Sample had initially paid it, and then sought a refund at counsel's suggestion after a question arose concerning that payment during McVey's deposition in May 1993 -- suggests a hypersensitivity on the part of Sample's attorneys to the 70 dBu overlap question. After all, it was Linder who initially requested McVey to determine whether 70 dBu overlap could be avoided, and McVey reported the results of Owl's study to Linder. Why McVey, rather than Linder, was stuck with the bill is a mystery.

and at the hearing stated her belief that 70 dBu overlap was to be avoided because of potential interference between KKSI and the Eldon station -- but could not recall the source of that (mis)understanding.

55. Enlarged Issue 1 asks whether the Sample application "was filed for the purpose, in whole or in part, of delaying action upon and grant of the application of Rivertown" Without attributing such intentions to Ms. Sample-Day herself, since she does appear to be sincerely (if naively) interested in attaining station ownership, and has no long-term economic stake in KKSI, the conclusion that Bruce Linder held such intentions is inescapable. KKSI (and thus Bruce Linder and his father, Donald) have been the beneficiaries of the delayed entry of new competition from the Eldon station which would have come sooner (by at least two years) had the Rivertown application been unopposed. Unexplained on this record is what caused Mr. Linder to abandon his initial "disinterest" in involvement in an Eldon application. While he pleaded the existence of his "other responsibilities" as the reason for his choosing to be a "limited" rather than a general partner (a rationale which lacks credibility, since he is currently the general partner in a new station in St. James, Minnesota, for which he has no day-to-day responsibilities), those "other responsibilities" more logically would have compelled adherence to his initial "disinterest" in applying for Eldon.

56. Bruce Linder's attempt to minimize the new competition

to KKSI which would ensue from a new Eldon station was, at best, disingenuous. He acknowledged that Ottumwa is the principal trading center for southeast Iowa, and the source of 50% of KKSI's sales revenues, and that Sample's Eldon station would also serve Ottumwa and the surrounding area.²³ McVey's opinion that the Eldon station and KKSI would compete for audience and revenues is clearly correct, and there seems little doubt that KKSI and its owners have in fact been the beneficiary of the delay engendered by the filing and prosecution of the Sample application.

57. Enlarged Issue 2 seeks to determine whether O-Town Communications or any of its officers, directors, and stockholders is a real party-in-interest to the Sample application; enlarged Issue 3 seeks to determine the extent of the involvement of Bruce Linder in the planning and development of the Sample application.

58. Obviously, Bruce Linder, a 25% stockholder, officer, and director of O-Town is a party-in-interest to the Sample application. It was he who asked McVey to determine whether the Eldon station could be engineered to avoid 70 dBu overlap with KKSI; it was he who suggested the limited partnership arrangement. He has totally financed the prosecution of the application, and he proposes to lend the partnership all of the

²³ Ms. Sample-Day's assertion that she chose her transmitter site expressly to avoid providing city-grade service to Ottumwa because it is "over-radioed" is difficult to credit, and is inconsistent with her acknowledgement in the next breath that Ottumwa was part of her intended market area.

funds required for construction and operation of the station. Crediting, for the sake of argument, his testimony that he has avoided direct involvement in the details of the preparation of the application (although he was advised thereof by Ms. Sample-Day periodically), the preparation of the application was left to Ms. Sample-Day (an O-Town employee), assisted and guided by McVey (a 20% stockholder, officer, and director of O-Town), and by FCC counsel representing both O-Town and Sample. As Ms. Sample-Day "didn't have much money," she was granted a 40% equity interest valued at \$4,000, in return for her "services" to the partnership.

59. While McVey has sought to explain away his statements to Brown that the Sample transmitter site was selected to avoid 70 dBu overlap with KKSI with the assertion that his selection was based on his misunderstanding of the "passive" role of Bruce Linder, the fact remains that avoidance of such overlap was the guiding principle in his focusing the search for a site. It is also a fact that Bruce Linder first inquired of McVey whether the Eldon allocation would permit a site not involving such overlap, and that McVey reported Lysiak's conclusion that it would to Linder, who reported it in turn to his father. That Ms. Sample apparently believed that 70 dBu overlap with KKSI must be avoided because of interference considerations, rather than because of the Commission's duopoly rules, does not detract from the conclusion that McVey correctly reported to Brown that the Sample transmitter site was selected to avoid such overlap.

60. The totality of these circumstances lead to the conclusion that O-Town Communications is the co-sponsor (with Bruce Linder) of the Sample application, and must be deemed a real party-in-interest thereto. This conclusion is reinforced by the fact that the owners of O-Town engaged in a deception of the Commission at the time that its application for what is now KKSI was granted in December 1989, and perpetuated that deception by failing to reveal that an oral agreement had been reached between Mark McVey (the nominal 100% owner of O-Town in 1988 and 1989) and John and Donald Linder for the transfer of control of O-Town to the Linders, in return for their agreement to lend O-Town the funds needed to achieve a settlement with a competing applicant, and thereafter to construct the station.²⁴

61. One of the reasons for the Commission's interest in the "character" of its licensees is that it must rely upon them to be candid and honest with the Commission in their applications and required reporting. A licensee which has demonstrated a lack of such character, through concealing material facts (such as agreements for future ownership), may not be relied upon in the future to be candid and forthcoming. O-Town's and Bruce Linder's

²⁴ In December 1989, when the O-Town application was granted, the Commission was on the brink of reconsidering its 1989 action approving of a "third-party" settlement agreement in Rebecca Radio of Marco, 4 FCC Rcd 830. In February 1990, it reconsidered and set aside that action, and disapproved of the "third-party" settlement agreement there involved, on the ground that approval of such agreements "disserves the public interest by creating an economic incentive for the filing of sham applications in future cases." Rebecca Radio of Marco, 5 FCC Rcd 937 (1990), recon. denied 5 FCC Rcd 2913 (1990).

co-sponsorship of the Sample application is fully consistent with the unrevealed role which Bruce Linder's father and brother had in O-Town at the time that its application was granted in 1989.²⁵

62. Enlarged issue 4 seeks to determine the programming intentions of Sample, "with particular reference to potential duplication of the programming of Station KKSI-FM." Although Ms. Sample has denied that she intends the duplication of KKSI's programming, McVey has stated to others that such is the intention. He has sought to explain such statements away by characterizing them as merely his own speculation, born of his personal view that program duplication makes economic sense, and he denies that Ms. Sample indicated such an intention to him. Extrinsic evidence strongly suggests that such program duplication for at least part of the time was an assumption underlying the planning and preparation of the Sample application. Sample's "Draft Budget" proposed a staff of eight fulltime employees: a general manager, three salespersons, and four DJs. However, its final budget allows for a staff of only four full-time and four part-time employees, to operate the station eighteen hours a day, seven days a week, for a total of 126 hours. The fulltime personnel were identified as the general

²⁵ That Bruce Linder was not directly involved in the 1989 oral agreement among his brother John, his father, and Mark McVey is not material. The close Linder family relationships insofar as radio is concerned are manifest in the facts that Bruce Linder acquired his current interest in O-Town from his brother and father for approximately \$2,500, paying just par value for the O-Town stock; and that his 9.5% interest in Minnesota Valley Broadcasting was a gift from his father.

manager, a sales person, a traffic manager, and a program director. Although the functions of the part-time employees were not identified, assuming that each will be an announcer (DJ), each would have to work 32 hours a week to cover the 126 hours of operation proposed -- unless partial duplication of the KKSI programming is to be involved.

63. Enlarged Issue 5 seeks to determine whether Sample's application "affirmatively misrepresents material facts, or knowingly conceals material facts." The foregoing paragraphs identify various aspects of the Sample application's concealment of the overarching fact that O-Town is the real and undisclosed party to the Sample application. That is not to say, however, that Ms. Sample-Day "knowingly" engaged in such a concealment. It is clear that she was being used, and the same naivete which made her useful to her employer, O-Town, and its owners probably prevented her from comprehending that she was being used, or that the Linders' agenda was more complex, and less benign, than her own.

64. Nevertheless, in view of the conclusion that O-Town and Bruce Linder are the true co-sponsors of and parties-in-interest to the Sample application, their knowledge of the concealment must be attributed to the applicant, irrespective of the fact that it was Ms. Sample-Day who signed the application. Accordingly, it must be concluded that the Sample application "knowingly concealed material facts," requiring its disqualification under enlarged Issue 6.

**B. Rivertown Must Prevail Under
The Comparative Issue**

(1) Rivertown

65. As detailed in the findings, Rivertown is owned by two persons, David Brown (55%) and Ellen Bowen (45%). Both will be fully integrated into the management of the station, Brown as general manager, and Ms. Bowen as its business manager. Brown has broadcast experience (including station management) dating back to 1977, when he was still in high school. Ms. Bowen has had three years of broadcast experience, some of which was in managerial positions.

66. Brown was born in Ottumwa (within the service area), and has spent most of his life living (and working) within the proposed service area. Up to the time the application was filed in October 1991, he had lived all but two years, ten months of his life within the proposed service area, and has worked at several stations licensed to communities within the service area -- Ottumwa, Bloomfield, and Fairfield. He purchased a residence in Eldon in October 1991, where he currently spends weekends and holidays, and to which he will move upon grant of the application. He participated in a number of civic activities in Ottumwa in 1982-83, while employed by stations there; and was involved in several civic activities in Fairfield in 1988 and 1989 while employed there.

67. Ms. Bowen has lived in Fairfield (within the service area) since 1979, and has been active in her church.

68. Neither Mr. Brown nor Ms. Bowen has any other media

interests, nor does Rivertown itself.

(2) Sample Broadcasting

69. Sample Broadcasting is a classic two-tiered applicant: As its sole general partner, Ms. Sample-Day proposes to be its fulltime general manager, and claims credit for 100% integration. Although born within the service area, she moved to Mexico while a child, and did not resume her residence in the service area (in Ottumwa) until November 1988. Her mother is "full-blooded Hispanic," and Sample claims a minority preference on that account.

70. Her broadcast experience consists of less than two years with a television station in Ottumwa, first as an unpaid volunteer, and later as a part-time news reporter; and employment by KKSI as "news director" since October 1990. Her claimed "civic activities," summarized at ¶18, supra, are insignificant. She has no media interests.

(3) Rivertown and Sample Compared

71. Assuming, arguendo, that Sample's proposal is taken at face value, it cannot prevail over Rivertown under the comparative criteria. Each applicant proposes 100% integration of ownership and management, and neither earns a diversity demerit. Thus, the choice would be based upon their respective qualitative enhancements.²⁶

²⁶ Sample's claimed credit for proposing to install an auxiliary generator must be rejected. Since it proposes to locate its studios and its transmitter at separate locations, it would require two generators -- not one -- to enable the station
(continued...)

72. Rivertown's integration is enhanced by David Brown's long residence in the service area (all of his life, with the exception of three periods totalling less than three years), and by Ms. Bowen's residence in the service area since 1979. By contrast, Sample's local residence enhancement is modest: Although born in the service area, she moved to Mexico as a child, and did not return until November 1988, and thus had lived in the area less than three years at the time these applications were filed.

73. Rivertown's integration is further enhanced by the extensive (14 years') broadcast experience (much of it managerial) of Mr. Brown, as well as by Ms. Bowen's three years of broadcast experience at the Fairfield stations. Ms. Sample-Day's experience has been of limited duration, and in positions of less responsibility.

74. Sample's claim for additional enhancement credit for Ms. Sample-Day's minority (Hispanic) background is problematic: While her mother was Hispanic, her father was not (nor is her recently-acquired husband). Her prior employer, KOIA-TV, did not apparently consider her to be Hispanic, since its Form 395-B covering the January 1990 employment period reported no Hispanic employees, fulltime or part-time. The Commission's instructions covering that form, at Paragraph 9.d., pertinently counsel: "The category which most closely reflects the individual's recognition

²⁶(...continued)
to continue to operate in the event of a power failure -- the objective of the credit.

in his community should be used to report persons of mixed racial and/or ethnic origins." Based on having observed Ms. Sample-Day in person, it is quite probable that she is viewed in the community as "White (Not Hispanic)" rather than "Hispanic," to borrow the terminology of Form 395-B. At most, whatever enhancement is due Sample for her "minority" status is so attenuated that it cannot overcome the enhancements accruing to Rivertown for the greater duration of local area residence and the superior broadcast experience of its principals.

75. As noted, the preceding comparison assumes that Sample's application is taken at face value. The record simply does not permit such a conclusion. The Sample application is another variation upon the recurring theme of two-tiered entities involving a nominal "control" principal having comparatively desirable attributes (minority, gender, local residence, and lack of media interests), coupled with an assertedly passive principal lacking such attributes.

76. The facts detailed above demonstrate that Ms. Sample-Day was chosen by Mr. Linder without regard for her lack of business or sales experience, or for her lack of money. He had known her for less than a year, and seen her only a dozen times at most, when the application was conceived. He did not ask for her resume, or her balance sheet, nor did she ask for his. It was Bruce Linder who chose the limited partnership vehicle (she didn't know the difference between a partnership and a corporation); her concern that she would be personally

responsible for all station losses beyond his \$6,000 capital investment was dismissed by him as one of several "quip[s] . . . about things she didn't completely understand." He claims that he suggested several possible communications attorneys and engineering consultants to her, and implies that it was merely coincidence that she chose those utilized by KKSI. While he maintained a respectful distance from the details of the application, he was aware that she was being guided by McVey and by his own lawyers.

77. Ms. Sample-Day has made no financial contribution for her 40% equity. Bruce Linder is the sole source for Sample's funding, both to cover the costs of prosecuting its application, and for the construction and operation of its station, and will receive a lien on the station's assets to secure his \$300,000 construction loan to Sample. Although he will assign that lien to his bank (the source for his \$300,000 loan to Sample), he will continue to be the principal creditor of the partnership; while the partnership agreement specifically provides that the terms of his initial loan (to fund the prosecution of the application) bar him from exercising any right to control or influence the activities of the partnership, no such limitation is contained in his letter agreement of October 9, 1991, to lend \$300,000 for the construction and operation of the station.

78. Under the terms of their partnership agreement, all partnership losses beyond \$6,000 will be allocated to Ms. Sample-Day; most importantly, the limited partnership will terminate in

the event of her insolvency. It is, of course, hornbook law that a general partner is responsible for the debts of the partnership. Should Sample Broadcasting default in repaying its loan from Bruce Linder, Ms. Sample-Day is responsible for that debt, and if she is unable to pay it, by definition she is "insolvent."²⁷

79. Moreover, the partnership agreement accords Bruce Linder a right of first refusal to acquire Ms. Sample-Day's interest, should she die, become incapacitated, or "desire . . . to dispose of" her interest; and to acquire the assets should she desire to dispose of them; see ¶22, supra.

80. The Supreme Court has recognized that "The FCC's Review Board in supervising the comparative hearing process seeks to detect sham integration credits claimed by all applicants, including minorities," and it has charged the Commission to "identify and eliminate those applicants who are not bona fide;" Metro Broadcasting, Inc. v. F.C.C., 110 S. Ct. 2997, 3025 n. 48 (1990). The U.S. Court of Appeals for the District of Columbia Circuit has noted that the Commission's comparative criteria have spawned a number of "'strange and unnatural' business arrangements" Bechtel v. F.C.C., 957 F.2d 873, at 880 (D.C.Cir.

²⁷ The Federal Bankruptcy Act (11 U.S.C. §101[32][A]) defines "insolvent" as a "financial condition such that the sum of such entity's debts is greater than all of such entity's property at a fair valuation, exclusive of (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and (ii) property that may be exempted from property of the estate under Section 522 of this title." "Entity" is defined, at 11 U.S.C. §101(15), as including a "person."

1992). As the Review Board recently stated:

"At the FCC and in most of the 'sham' cases cited by the courts, we experience these curious business role reversals in which those with experience and finances enlist an inexperienced and impecunious individual as their putative 'controlling' principal. The intent of these upside-down constructs is manifest."

Gloria Bell Byrd, 7 FCC Rcd 7976, at 7980 n. 34 (R.Bd. 1992).

81. Sample presents just such a case. While Ms. Sample-Day is not totally lacking in broadcast experience, and while she and Mr. Linder were not complete strangers prior to the formation of the applicant, her experience scarcely qualifies her for assuming the managerial controls of a start-up operation (witness her total reliance upon KKSI's McVey for selecting her equipment package). Indeed, she was not even considered for the general manager position at KKSI which opened just a month prior to the initial discussion between her and Bruce Linder concerning the Eldon application.

82. For his part, Mr. Linder's seeming indifference to her lack of business experience and financial capabilities, despite having known her for barely eight months (during which he estimates that he actually saw her on about a dozen occasions), further confirms that the Sample partnership is not a bona fide business relationship, and that his asserted intent to remain detached while she plays "general manager" with his \$300,000 (having made no investment of her own) cannot be viewed seriously. See Annette B. Godwin, 8 FCC Rcd 4098 (Rev.Bd. 1993), and cases cited therein.

83. While Bruce Linder has been careful to keep his

fingerprints from appearing on the Sample application, he has had the continuing ability to control Ms. Sample-Day in several ways:

(1) She was and continues to be an employee of O-Town, which is controlled by Donald Linder and over which Bruce Linder personally exercises that control on behalf of his father.

(2) Sample has been represented by Bruce Linder's own attorneys, and the very existence and continuation of that representation manifests their judgment that there is no conflict of interest between KKSI and the Linders, on the one hand, and Sample Broadcasting and Ms. Sample-Day, on the other. Were Ms. Sample-Day to propose to undertake any independent action which the Linders believed to be inimical to the interests of KKSI or the Linders, they would be ethically obliged to withdraw.

(3) Ms. Sample-Day has relied upon KKSI stockholder McVey (with whom Bruce Linder is in regular contact) for detailed guidance in the preparation of the Sample application, and it may be presumed that she would be similarly reliant upon him to assist her in constructing and placing the station in operation were Sample to be awarded the permit.

84. In sum, assuming that the comparative issue is reached, the Sample two-tiered structure must be regarded as not bona fide, but as a sham designed to maximize whatever credit might be accorded Ms. Sample-Day's fractional minority status, and to foreclose comparative consideration of Mr. Linder's multiple

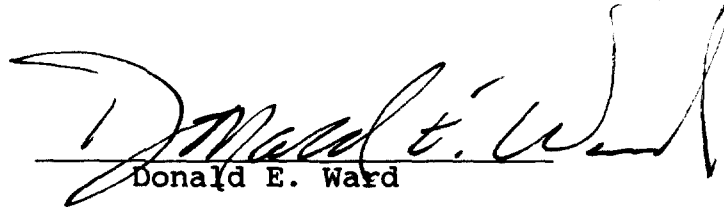
broadcast interests, and his distant residence. So viewed, it is clear that Sample cannot prevail over Rivertown, earning at most a 40% integration credit, and weighted down with the Bruce Linder's many media interests, including the overlapping service of Station KKSI.

85. Accordingly, it is urged that the application of Rivertown be granted, and that of Sample be denied.

Respectfully submitted,

RIVERTOWN COMMUNICATIONS COMPANY, INC.

By:

A handwritten signature in dark ink, appearing to read "Donald E. Ward", is written over a horizontal line.

Donald E. Ward
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Its Attorney

August 18, 1993

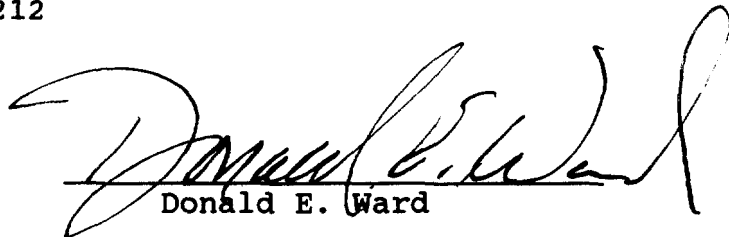
CERTIFICATE OF SERVICE

I, Donald E. Ward, do hereby certify that I have this 18th day of August, 1993, caused to be served by first class United States Mail, postage prepaid, a copy of the foregoing "PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW" to the following:

Hon. John M. Frysiak*
Administrative Law Judge
Federal Communications Commission
2000 L Street N.W.
Washington, D.C. 20554

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Donald E. Ward

* By Hand